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Thirty-third session

SUMMARY RECORD OF THE 680th MEETING

Held at Headquarters, New York,
on Wednesday, 14 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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00-47923 (E)

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The meeting was called to order at 10.05 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.4)

1. The CHAIRMAN invited the Commission to resume discussion of the United States proposal regarding the scope of the draft Convention (A/CN.9/XXXIII/CRP.4).

2. Mr. MORÁN BOVIO (Spain) said that he fully supported the substance of the proposal but that it might be best to move the list of items which were not receivables under the draft Convention to article 4.

3. Mr. IKEDA (Japan) said that, since adoption of the proposed amendments to article 6 and article 4 would require the deletion of article 5, the proposal should be considered as a package. The great advantage of the proposal was that it would obviate the need to use the term "trade receivable"; article 73 of the analytical commentary to the draft Convention (A/CN.9/470) noted that the definition of "trade receivable" was similar but not identical to the use of the term in the Ottawa Convention. Moreover, although paragraph 53 of the commentary referred to "the well-known notion of "trade receivable"", that term was not well known in Japan and, in fact, had not been used in the Working Group until the most recent session.

4. It was not the United States delegation but the European Banking Federation which had first proposed that the draft Convention should include a list of items not considered receivables for the purposes of that instrument. At the time, the Working Group had objected to the idea on the grounds, inter alia, that such a list could not be exhaustive. The proposal currently under consideration should therefore be subjected to close scrutiny.

5. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) said it was his understanding that in the United States proposal the list of items to be considered receivables under the draft Convention was intended to be indicative rather than inclusive but that the list of items not considered receivables was exhaustive. He requested clarification of the matter.

6. Mr. SMITH (United States of America) said that, on the contrary, the items defined as receivables in the first part of his delegation's proposal were intended to be the only ones covered by the draft Convention; the list was very broad and covered virtually all receivables to which that instrument would normally apply. The list of items not considered receivables applied directly to exclusions from the former list.

7. The CHAIRMAN pointed out that the proposal did not allow for the possibility of receivables which did not currently exist but which might one day need be covered by the draft Convention.

8. Mr. SMITH (United States of America) said that, as the Commission had no way of knowing what such items might be, it could not predict what rules might

apply to them. For the foreseeable future, receivables arising out of the sale or lease of goods, the provision of services, loan monies and the licensing of information accounted for virtually all receivables qualifying for cross-border financing.

9. Mr. FRANKEN (Germany) said that, since governments had had over five months in which to consider the draft Convention and to submit comments thereon, it was somewhat unfair of the United States delegation to present such a comprehensive proposal at a very late date.

10. Moreover, the proposal had fundamental weaknesses; the list of items considered receivables for the purposes of the draft Convention was intended to be exhaustive but might contain loopholes. It would therefore require extremely close study in order to determine whether its definition was broad enough to cover, inter alia, receivables stemming from dividends, interest payments and interest paid on the basis of security loans. His own delegation considered that, as a matter of principle, the draft Convention should begin with a more general definition of receivables before listing exclusions.

11. The Commission had before it another proposal, that of the European Banking Federation, which had been submitted in a timely fashion and was in line with the Working Group's most recent deliberations. Only if the Federation's text proved unacceptable should the possibility of discussing the United States proposal be considered.

12. Mr. TELARANTA (Finland) said that he agreed with the representative of Germany.

13. Mr. WHITELEY (United Kingdom) said that he shared the German delegation's concern regarding the timing of the proposal and the need to consider its impact. However, the United States representative had explained that the proposal had arisen from issues raised by United States financial institutions; such consultation was important, and the United States financial services industry had an impact that extended beyond its national territory. Moreover, the proposal addressed issues that had not been fully covered in that of the European Banking Federation.

14. The draft Convention could be amended in several ways. In addition to the issues of scope raised in the United States proposal, the Commission might wish to consider changing the rules governing the priority of interests in land, bank accounts and securities held in systems such as Euroclear; his own delegation would prefer in such cases to give priority to the location of the land or the account. He also shared the United States delegation's concern at the potential impact of the draft Convention on netting agreements, where the mandatory rules applied outside the Convention would mean that an assignment in breach of a contractual prohibition of assignment was effective. However, article 5, variants A and B, of the existing draft also addressed those issues. Thus, his delegation supported the general principles embodied in the new proposal but would like more time to review it.

15. Mr. AKAM AKAM (Cameroon) said that he shared the concerns expressed by the representative of Germany, particularly as some of his own delegation's

proposals had been rejected on the grounds that they had been submitted too late in the discussion process. He was also opposed to listing the receivables covered by the draft Convention; it would be better to define those receivables in general terms and to list only the exclusions. Further details could be provided in a set of legislative guidelines, as in the case of other UNCITRAL conventions.

16. Mr. STOUFFLET (France) said that adoption of the new proposal would radically change the very purpose of the draft Convention The Working Group had decided to give that instrument as broad a scope as possible. At a later stage, it had felt the need to ensure that application of the draft Convention and, in particular, its provisions on anti-assignment clauses would not disrupt the function of certain collective netting regulatory mechanisms and had therefore made a distinction between trade receivables and financial receivables; the former would not be excluded from the scope of the instrument but would be covered by a special regime.

17. Suddenly, the United States delegation had proposed a long list of receivables to be covered or excluded. While he was not in a position to determine whether that list was well-founded or not, he feared that receivables which might come into being in the future would not be covered. Furthermore, delegations would need at least six months or a year to consult their national specialists regarding what would be, in essence, a new instrument, the very name of which would have to be changed if the United States proposal were adopted.

18. France's banking professionals had initially been reluctant to support the draft Convention, not because of its provisions but because they would have preferred to leave the industry to regulate itself without interference from international bodies. With some difficulty, they had been induced to support the new instrument, but he did not know whether they would agree to the changes contained in the United States proposal.

19. Mr. MORÁN BOVIO (Spain) pointed out that the Commission was not a diplomatic body whose members were obliged to seek and follow instructions from their Governments. The issue of timeliness was irrelevant and public criticism of the United States delegation on those grounds inappropriate. The Commission should focus on the substance of the proposal.

20. Mr. GHAZIZADEH (Islamic Republic of Iran) expressed general support for the United States proposal, which he considered helpful, but sought clarification about items and instruments which were not included in the list and might need to be added in the future.

21. Mr. DOYLE (Observer for Ireland) expressed surprise at the vehemence of the attack on the United States proposal on the grounds of its timing. It had been common in the Working Group for delegations to submit draft proposals at short notice. It was quite unrealistic to contemplate a further six months of discussion. Moreover, the elements of the proposal were not new: it was a response to problems that had been raised at the Working Group - and on which the Commission had invited the Working Group's views - and had remained unresolved. The representative of France was correct in stating that the draft Convention contained definitions of the word "receivable"; but they had not met

with universal satisfaction. Those whom he had consulted in Ireland considered the scope of the definition to be too broad and the exclusions too few. The proposal therefore deserved serious consideration. He himself supported it, on the whole, although he would wish to make detailed comments on the merits of individual items. He also favoured allocating the first part to draft article 6 and the second to draft article 4.

22. Mr. FERRARI (Italy) agreed that the proposal should be considered on its merits; it was, after all, the product of consultations with the banking industry. Equally, however, in common with others, his delegation felt obliged to solicit the reaction of professionals in his own country before making any final decision; and he would dismiss out of hand some of the proposal's provisions.

23. Mr. DUCAROIR (Observer for the European Banking Federation) fully acknowledged the importance for delegations of consulting banking professionals in their own countries. He noted, however, that his Federation's proposal had benefited from consultations with banking representatives not only from Europe but also from the United States and other countries, as the endorsement by the Financial Markets Lawyers Group contained in document A/CN.9/472/Add.1 showed. The International Swaps and Derivatives Association had also expressed support. In other words, his Federation had ensured broad acceptance of its ideas before submitting its proposal.

24. Mr. KUHN (Observer for Switzerland) said that the Commission should disregard the timeliness or otherwise of the proposal and concentrate on its substance, which raised valid concerns. He had doubts about some aspects of the proposal, but the Commission could afford to devote some time to discussing it.

25. Mr. Al-ZAID (Observer for Kuwait) expressed broad support for the proposal, particularly because its scope extended beyond banking to industrial and intellectual property. It was not perfect, however. He feared that its adoption might require an amendment of draft article 5 and further attention from the Working Group, if the draft Convention was to be universally acceptable. Delegations should, therefore, be given the opportunity to engage in consultations in their home countries.

26. Mr. PICKEL (Observer for the International Swaps and Derivatives Association) emphasized the importance of ensuring that the scope of the draft Convention was satisfactory. His Association had expressed a written preference for variant B, as amended by the European Banking Federation. Variants A and B both had flaws: in particular, they made a distinction between trade and financial receivables, which would undoubtedly give rise to problems of definition, in addition to the weaknesses noted by the representative of Japan. His Association favoured, however, the exclusion approach, even if the broad definition of the word "receivable" was adopted: the banks in Europe, which were among the Association's members in 37 countries, had been active in developing the standards whereby contracts were concluded and they were satisfied with the way they functioned. They would not welcome intervention from the draft Convention. For that reason, he was in favour of providing for the exclusion of financial netting contracts.

27. Mr. SALINGER (Observer for Factors Chain International) said that, if delegations consulted factors and invoice discounters as well as banking and financial practitioners, and if they envisaged the draft Convention lasting more than a few years, they would realize that any inclusive list would cause severe difficulties. Some kinds of receivable existed that even three or four years previously would not have been thought suitable for factoring. A similar process was bound to occur over the next few years, with new kinds of receivable emerging. A list of exclusions, on the other hand, was acceptable, for example to meet the concerns of those who felt that draft article 11 would destroy existing arrangements for swaps and derivatives.

28. Ms. WALSH (Observer for Canada) said that, as previously stated, the issues addressed by the proposal had first been brought before the Working Group, which had not been able to resolve the problems satisfactorily. As a result, it had fallen to the full Commission to consider the matter. She could not accept all the details relating to exclusion and inclusion, but she believed that the proposal should be addressed on its merits.

29. Ms. MANGKLATAKUL (Thailand) said that, although the lists would be useful for her country, a relative newcomer to international banking, the scope and applicability of the draft Convention should be as broad as possible. There was a danger that, while countries were preparing to accede, changes might take place that would invalidate the lists.

30. Ms. POSTELNICESCU (Romania) concurred with those who had pointed to the dangers of limitations; there was no knowing what receivables might emerge over the next few years. On the other hand, she welcomed the detail in which the proposal had been drafted, as a result of which it would be easier to enforce the draft Convention.

31. The CHAIRMAN noted that the proposal enjoyed general support, although some feared that the Commission's work would be hampered by the need for delegations to engage in consultations. The main issue was whether the exhaustive list of receivables contained in the first part was desirable. Many speakers had also expressed the view that more time was needed to consider the exclusion list. He suggested that the meeting should be suspended while informal consultations took place.

The meeting was suspended at 11.15 a.m. and resumed at 11.50 a.m.

32. Mr. SMITH (United States of America) suggested that the Commission should first consider the proposed list of exclusions from the draft Convention, in article 6 (x) (ii) of his delegation's proposal in document A/CN.9/XXXIII/CRP.4. It could then look at rights to payment that would be covered by the draft Convention, and determine whether there could be a general formulation of those rights.

33. His delegation proposed that rights to payment arising from transactions on a regulated futures exchange should be excluded from the Convention, because rights to payment arising from the sale of crops or other farm products and other commodities were often traded on exchanges that were regulated by local governments through special brokers licensed by local governments. If the draft

Convention were to apply to those rights to payment, it would be possible for someone who traded a commodity future and had a right to payment through a broker to assign that right so that the broker would have to make the payment to the assignee in order to receive a discharge; that would create a choice of law situation in respect of the assignor's jurisdiction and would eliminate the broker's right of set-off under other laws, and might create a situation in which an assignment was effective notwithstanding an agreement between the broker and the assignor that the assignor would not assign the right to payment. His delegation therefore felt that the draft Convention rules might not be well suited to that highly regulated industry, which involved sophisticated parties and in which there was no need for the financing that the draft Convention would permit.

34. The CHAIRMAN asked whether the exclusion was meant to apply only to regulated commodities and futures exchanges, or would apply to all future exchanges.

35. Mr. SMITH (United States of America) said that his delegation had intended that the exclusion would apply only in situations where the exchange was regulated by exchange rules under government supervision. The idea was to distinguish between private party sales and sales between parties which were members of an exchange or had accounts with members of an exchange.

36. Mr. WHITELY (United Kingdom) said that his delegation believed that the exception should be extended to all exchanges, not just derivatives exchanges. There was a degree of consolidation in stock and futures exchanges and in some cases it might be impossible to distinguish between a derivatives exchange and a cash market. One justification for the exemption was that the rules of exchanges in many jurisdictions, including the United Kingdom, were given priority over other laws by specific statutory legislation; his delegation therefore felt that it would be inappropriate for the draft Convention to apply in those circumstances.

37. Mr. SMITH (United States of America) said that article 6 (x) (ii) (I) referred to securities sold on exchanges. The point made by the representative of the United Kingdom could be considered in the context of a more general formulation. His delegation would support such a formulation, covering the items on the list it had prepared, if that language achieved the same objective.

38. The CHAIRMAN suggested that the Commission should proceed to a general consideration of other items on the list of possible exclusions, and revert to each item later in order to give policy directions to the Working Group.

39. Mr. SMITH (United States of America) said that the items in article 6 (x) (ii) (B) (rights to payment arising from the sale, lease or loan of gold or other precious metals) and (H) (rights to payment arising from foreign exchange contracts) could be considered together, because gold and other precious metals were treated on exchanges very much like currency.

40. Mr. SCHNEIDER (Germany) said that trading in gold and other precious metals was largely covered by the reference to regulated futures exchanges. Item (B) might not be necessary.

41. Mr. SMITH (United States of America) agreed that there was an overlap between (A) and (B). However, that overlap existed only to the extent that precious metals were traded on a regulated exchange. In the precious metals market, private parties often traded in precious metals and foreign exchange without participating in a regulated exchange, often through banks or other intermediaries under industry netting agreements. Even if most foreign exchange and precious metals transactions were covered under the exclusions relating to regulated futures exchanges and financial netting agreements, there was always a possibility of private parties trading without the use of netting agreements, where an exception would be in order.

42. Mr. SCHNEIDER (Germany) said that he had difficulty with the idea of excluding private transactions in gold and precious metals, such as professional trading in gold for jewellery. His delegation felt that it would be sufficient to refer to regulated exchange trading, which would include foreign exchange, gold and precious metals.

43. Mr. WHITELY (United Kingdom) said that, in some jurisdictions, the government controlled transfers of currency, and those controls could include controls on the transfer of precious metals either within the jurisdiction or form the territory of the jurisdiction to off-shore parties. His delegation believed that, if the draft Convention was to retain its appeal, an exception might be appropriate. His Government had specific concerns about gold held by the central bank, whether on an allocated or an unallocated basis; it would not want the Bank of England to be required to determine priority rules for gold in accordance with an offshore jurisdiction if the assignor were outside the United Kingdom.

44. Mr. STOUFFLET (France) said that his delegation agreed with the delegation of Germany that it would not be wise to decide that a receivable was excluded from the scope of the draft Convention simply because of the nature of the object which gave rise to the receivable; it was the method of settlement which justified an exclusion. In the case of gold, either the transaction was made on a regulated market, in which case the exception in (A) was justified, or the operation was part of a netting agreement between the buyer and the seller, in which case the exception in (C) could apply. However, as had been pointed out, gold could also be sold in an isolated operation, as in the case of industrial gold; and there was no reason why the fact that a receivable derived from the sale of gold or other precious metals should be a ground for excluding it from the application of the draft Convention. Furthermore, it was not clear at what point a metal was no longer a precious metal.

45. Mr. SALINGER (Observer for Factors Chain International) said that he supported the view expressed by the representative of France. Moreover, gold, silver and precious metals were often the subject of factoring arrangements, for example in sales to jewellers, and it was the nature of the transaction rather than the nature of the underlying commodity that was important. There would also be complications with regard to alloys.

46. Mr. DOYLE (Observer for Ireland) said that he also supported the points made by the representative of France. Moreover, exception (B) could set back the Commission's work. He recalled that the Commission had started out with a

detailed list of exclusions and had taken a decision to limit exclusions to receivables of a domestic nature or receivables which were already sufficiently regulated. He did not feel that item (B) fell into either category, and was concerned that an exception of that nature might open the door to other equally detailed and specific exceptions, which would be contrary to the decision taken on the scope of the definition of a receivable.

47. Ms. CHUNG (Observer for the Republic of Korea) said that her delegation aligned itself with the comments made by the representative of France. The criterion for exclusions from the scope of the draft Convention should be whether there was a unique industrial practice, or payment technique, not the content of the transaction. The issue also arose in relation to payments under foreign exchange contracts.

48. Mr. SMITH (United States of America) said, with regard to exclusion (C) (rights to payment under a financial netting agreement), that a netting agreement represented an overall relationship between two parties which entered into numerous transactions and, when that relationship was terminated, combined all credits and debits to create one sum owed by one of the parties to the other party. Those contracts were made among sophisticated parties, using industry-tailored agreements designed to facilitate the many transactions between the two parties, and his delegation did not believe that all aspects of the draft Convention would be applicable to such transactions. It also had concerns about whether an assignment would be effective despite an anti-assignment clause, whether the rights of set-off between the two parties would be preserved, and how the debtor would achieve discharge; moreover, because securities or other rights to payment were often offered as collateral and held in specialized deposit or security acccunts, the choice of law rules might not be appropriate. His delegation therefore proposed that netting agreements should be excluded, since those transaction did not require the intervention of the Convention to make possible the extension of credit.

49. Ms. WALSH (Observer for Canada) asked whether the exclusion was intended to cover netting agreements or multilateral netting agreements in non-financial contracts such as netting agreements among airlines or in the farming business.

50. Mr. SMITH (United States of America) said that his delegation had felt that the exclusion should be limited to financial netting contracts; it had no particular view as to whether other netting contracts should be included.

51. Mr. SCHNEIDER (Germany) said that his delegation supported the idea behind the exclusion, and believed that multilateral netting agreements should be excluded. However, it was not clear whether exclusion (C) referred only to the type of receivables that existed after netting agreements were concluded or referred also to receivables which went into netting agreements.

52. Mr. DUCAROIR (Observer for the European Banking Federation) wondered whether exclusions (C) and (I) could be combined in a single provision. The practice of netting as covered in (C) was very often accessory to a financial contract, for example loans of securities or pensions based on securities, which came under paragraph (I), and also swaps and derivatives. The Federation

provided a list of such transactions in its own proposal, contained in document A/CN.9/472/Add.1, and attempted to define the term "financial contract".

53. Mr. DOYLE (Observer for Ireland) supported exclusion (C), the only problem being one of definition. As the United States delegation seemed to agree with the definitions provided by EBF in document A/CN.9/472/Add.1, perhaps that text could be the basis for drafting definitions of "financial contract" and "netting agreement".

54. Mr. PICKEL (Observer for the International Swaps and Derivatives Association) noted that definitions could be useful. He believed that the concept of a financial netting agreement covered transactions such as those carried out under the master agreement published by his organization. The representative of Germany had been correct in his comment that, under the relationship document, payments flowed back and forth between the parties in various transactions over time and were in that sense receivables from one party to the other. They might be subject to netting on a payment basis but, once that relationship was terminated, a single sum was determined as owing from one party to the other, which according to his organization's contract was assignable by the party who was entitled to receive that payment as security or otherwise.

55. Mr. WHITELEY (United Kingdom) supported the exclusion.

56. Mr. DESCHAMPS (Observer for Canada) said that the Commission should consider whether the exclusion or special treatment of netting agreements should include netting agreements in non-financial contracts. It had not yet been decided whether the protection should be obtained through complete exclusion or through variant B.

57. Exclusion (C) referred only to netting agreements relating to financial contracts. The German delegation had raised the policy issue of protection for netting agreements in financial contracts but not in other kinds of contracts. However, from a policy standpoint, business concerns such as airlines would also be justified in requesting similar protection, and then the text would exclude a number of trade receivables that the Commission would not necessarily want to exclude. As a tentative solution, he would propose that the matter be dealt with in article 5, concerning anti-assignment clauses, preferably in variant B.

58. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Commission might wish to decide whether netting arrangements in general should be treated through an article 11 and 12 approach. Alternatively, netting arrangements in financial contracts could be treated through an article 4 approach, meaning total exclusion from the draft Convention, while netting arrangements in other contracts could be dealt with by an article 11 and 12 exclusion.

59. Mr. SMITH (United States of America) said that there was no reason why the Convention in its entirety should not apply to the payment owed by one party to the other, once the relationship was terminated and the debits and credits were combined to determine the single sum owing. If non-financial netting contracts

were to be generally excluded, as well as financial netting contracts, in both cases the so-called "close-out payment" should be covered by the Convention.

60. The exclusion of netting contracts, whether financial or non-financial, from articles 11 and 12 only, did not seem likely to work. The industry experts consulted by his delegation had explained that, if the assignment between the assignor and the assignee was effective under national law despite the anti-assignment clause, and there was a breach of contract, the debtor might lose the mutuality that was necessary for preserving its right of set-off for transactions that were currently occurring or would shortly occur under their master contracts. For that reason, prior to close-out, the draft Convention should not apply to debits and credits between the parties; upon close-out, it would apply to the single sum owed by one party to the other.

61. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices), pointed out that the difficulty just mentioned by the United States representative concerning the lack of protection for the parties to a netting agreement would also arise if the Commission adopted an article 4 approach. Whether the Commission adopted an article 4 approach, or an exclusion from the assignment clause provisions of articles 11 and 12, national law would apply in both cases. The draft Convention could do nothing to protect the parties to the netting agreement against any risk involved. However, those parties could protect themselves through their own mechanisms and choice of laws and other appropriate solutions under their contractual arrangements.

62. Mr. MORÁN BOVIO (Spain) emphasized that the Commission did not seek to affect well-established general practices that were functioning well in the world at the present time. Yet the United States proposal would exclude some well-established practices, for example in the precious metals and other similar markets, because the subject of the transaction was being identified with the form of the transaction, to the extent that they could not be separated. It seemed that the same thing happened in markets that functioned under netting agreements. The Commission was not concerned with what happened during the netting itself, but could be interested in what happened with the resulting amount, and whether or not the draft Convention applied.

63. Exclusion under article 4 would be more appropriate in some cases, including in connection with netting agreements, in order to avoid distortion of well-established practices.

64. Mr. PICKEL (Observer for the International Swaps and Derivatives Association) said that an article 4 exclusion would take into account the fact that parties not only had master agreements in place to govern their relationships but typically would also have security arrangements, which would present a series of priority considerations. On behalf of its members, the International Swaps and Derivatives Association had obtained opinions in a number of jurisdictions on the enforceability of the master agreement as well as the enforceability and choice of law issues relating to collateral arrangements using documents sponsored by it. Its members had looked very carefully at a number of issues and had satisfied themselves as to their course of action.

65. The Commission should agree that certain types of netting agreements, for example between airlines, should be excluded. However, a general reference to netting agreements would mean that various transactions such as sales of goods or other things that should be governed by the draft Convention could be put under some kind of netting agreement and thus excluded from the draft Convention.

66. The financial netting agreement was an appropriate designation for the types of contract that should be excluded and he believed that an article 4 exclusion was more appropriate.

67. Mr. SCHNEIDER (Germany) said that there were different types of netting agreements, not only between banks and financial institutions, but also between other parties in industries such as industrial clearing, the transport industry, railways, and air traffic. The question was whether to have the same rule for all types of netting agreements or to have a separate rule only for financial institutions. In general, it would seem preferable to have the same rule. The main problem was anti-assignment clauses. In general he preferred an article 11 rather than an article 4 approach. However, a special case should be made for financial contracts, because other problems might arise in the case of financial contracts and netting agreements with receivables stemming from financial contracts. He therefore favoured an article 4 approach for financial contracts, and an article 11 approach for other types of netting agreement, such as industrial netting agreements.

68. Mr. DOYLE (Observer for Ireland) favoured an article 11 approach for netting agreements. There would thus be a very short list of article 4 exclusions which were outside the Convention altogether, and a rather longer and more elaborate list of provisions under article 11 which would be excluded from articles 11 and 12, but would enjoy the general benefits of the draft Convention. It had been his impression that netting agreements were to fall in the latter category.

The meeting rose at 1 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 681st MEETING

Held at Headquarters, New York,
on Wednesday, 14 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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Any corrections to the record of this meeting and of other meetings will be issued in a corrigendum.

00-47929 (E)

The meeting was called to order at 3.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470 and 472 and Add.1-4; A/CN.9/XXIII/CRP.4)

1. The CHAIRMAN reviewed the issues still to be decided in connection with the United States proposed revision of article 6 of the draft Convention (A/CN.9/XXXIII/CRP.4): the merging of subparagraphs (ii) (C) and (I), as proposed by the European Banking Federation (EBF); the exclusion of non-financial receivables in subparagraph (ii), for which there was general support; the question as to whether all or some receivables should be excluded and whether that should be done within the scope of provisions or under the anti-assignment clauses of article 11; the need for a definition of the term "netting", and the inclusion of close-out payments, for which there was strong support.

2. Mr. COHEN (United States of America) observed that, while on three of the four issues something close to a consensus was emerging, there was disagreement as to whether to approach some issues as a matter of exclusion or as a matter of exception. The United States favoured exclusion. If applicable domestic law fully enforced an anti-assignment clause in an agreement between parties under article 11 of the draft Convention, then there was no problem. The problem arose when applicable law either did not enforce such a clause or made the assignment effective between the assignor and the assignee and perhaps created action for breach, the trouble then being that many Convention rules were not suited to cover such assignment. Four main sets of rules that would be unsuitable were those regarding warranties and representations on assignment, debt protection, set-offs, and especially the choice-of-law rules in article 24 for priority matters. Given the variety of domestic laws, the United States delegation was concerned that producing a Convention that might apply to such matters was a dangerous solution and therefore favoured their exclusion from the scope of the draft Convention.

3. The CHAIRMAN asked whether the United States representative had all netting transactions in mind or just financial ones.

4. Mr. COHEN (United States of America) said that he certainly had financial netting in mind but would have to think further about whether the rule in question should be extended to cover non-financial netting.

5. The CHAIRMAN said he took it that there was consensus that subparagraphs (ii) (C) and (I) should be merged, as suggested by the European Banking Federation, and should be referred to the Drafting Group. More thought had to be given to the exclusion of non-financial receivables.

6. It was so decided.

7. The CHAIRMAN invited the Commission to consider whether a definition was needed of the term "netting agreement" and to comment on the definition proposed by the European Banking Federation (A/CN.9/472/Add.1, p. 12, subparagraph (o)).

8. Mr. BERNER (Observer for the Association of the Bar of the City of New York), said that the EBF text was an excellent basis for discussion. However, a synonym should be found for the term "set-off" used in subparagraph (o) (c), as its history made it inappropriate for use in the draft Convention.

9. Mr. COHEN (United States of America), agreeing that the EBF text could serve as a good working basis, suggested that delegations and observers should submit adjustments to the Drafting Group, which could prepare a revised text for further consideration.

10. The CHAIRMAN said that all the concerns expressed thus far, not excluding close-out payments, would have to be incorporated.

11. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) cautioned that the Drafting Group could establish language versions of a text agreed upon by the Commission but could not prepare language on matters not yet decided as to policy.

12. Mr. COHEN (United States of America) suggested that under the circumstances further ad hoc consultations should be held among delegations.

13. The CHAIRMAN, concurring, suggested that every member of the Commission should review the list of receivables and convey their ideas to an ad hoc drafting group of delegations, which would report back to the Commission with new language for its consideration.

14. Mr. SCHNEIDER (Germany) said that his delegation had problems with the EBF definition of a netting agreement. For instance, if a netting agreement was an agreement which provided for "one or more" of the three operations listed, that would mean that termination because of insolvency as set out in subparagraph (b) must in itself be considered a netting agreement, which was unacceptable.

15. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)) asked for clarification as to whether subparagraph (ii) (C) of the United States proposal was in fact being extended to include non-financial receivables. If so, his Federation's proposal to merge subparagraph (ii) (C) and subparagraph (ii) (I) would be withdrawn.

16. Mr. DESCHAMPS (Observer for Canada) said he did not think that subparagraph (ii) (C), which was an exclusion, should be extended to cover non-financial receivables. If the draft Convention excluded non-financial contracts subject to netting agreements, the result would be a very broad and ill-defined exclusion. Trade receivables subject to netting agreements might, however, need some protection and should be dealt with under either article 11 regarding contractual limitations on assignments or articles 20 and 21 regarding debtor's defences.

17. Mr. MORÁN BOVIO (Spain) said that he fully supported the proposed EBF definition of netting agreements, including the condition that "one or more" of the three operations indicated should be provided for, an occurrence that was very frequent in practice, especially in complex netting agreements. The

advantage of the EBF definition in subparagraph (o) was that its sharp focus clarified subparagraph (ii) (C) of the United States proposal.

18. Mr. SALINGER (Observer for Factors Chain International) said that he was puzzled by the EBF definition. He thought of a netting agreement as an agreement in the air transport field, say, where large numbers of traders pooled their debits and credits and the one with the net credit drew from the pool. The EBF text, however, conceived of just two traders, a situation which would surely exclude a great many transactions with set-off agreements.

19. Mr. PICKEL (Observer for the International Swaps and Derivatives' Association (ISDA)) said that the EBF definition contained all the essential elements of what he considered to be a netting agreement. It was true that such agreements were often multilateral; but in the financial markets they tended to be bilateral, while still covering many different transactions and the various cash flows involved, all of them typically subject to netting on payment dates and again upon termination of the relationship.

20. The CHAIRMAN invited the United States delegation to comment on subparagraph (ii) (D) of his proposed redrafting of article 6.

21. Mr. COHEN (United States of America) said that the Commission should be wary about proposing rules that would interfere with the very specialized arrangements involved in bank deposits and inter-bank payments, which were working well in the absence of a convention. Under any definition of a receivable, every bank deposit created a receivable, where the debtor was the bank and the creditor, which might become the assignor, was the depositor. The rules of the draft Convention barely applied to such a receivable, even with regard to location. That was true for any deposit, but especially so for inter-bank payment systems, which in many States operated through mutual accounts maintained between banks. Subparagraph (ii) (D) would exclude both types of receivables.

22. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)) said that there were two distinct categories of receivables included under the same heading in subparagraph (ii) (D). It was important to classify operations clearly and separately, according to their nature. The Federation also believed that, in addition to the inter-bank payment systems, which involved cash, the exclusion should cover securities settlement systems as well, namely, the final cash settlement between financial intermediaries of stock exchange operations. Such receivables were in an entirely different category from the receivables addressed in subparagraph (ii) (I) of the United States text and were not dealt with anywhere in the United States proposal.

23. Mr. WHITELEY (United Kingdom) also favoured excluding inter-bank relationships.

24. Mr. STOUFFLET (France) agreed with the observer for the European Banking Federation that it was undesirable to include under the same heading rights to payment under bank deposit relationships and under inter-bank payment systems. He would support the exclusion of inter-bank relationships, which was justified for the same reason as the exclusion of netting agreements. If subparagraph (D)

was intended to cover bank accounts, it should be understood that a bank account was a financial instrument which registered receivables as between a bank and its clients. It was appropriate to exclude bank accounts if the intent was to avoid perturbing the draft Convention. However, from a legal point of view there was no reason why bank deposits should not be treated as receivables subject to assignment, provided that the criteria for assignability were fulfilled.

25. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said it could be assumed, from the remarks of the observer for the European Banking Federation, that there was an intention to merge the rights specified in subparagraph (x) (ii) (C) (D) and (I). He was not sure whether, following the approach of the representative of France, deposit accounts would necessarily be excluded from the scope of the draft Convention. If such was not the case, it was important to know whether it was proposed to include them without special treatment or to treat them differently with respect to assignment agreements. A bank faced with an unknown creditor under an assignment agreement might encounter difficulty in meeting the requirements of money-laundering legislation. To avoid that situation, the suggestion by the observer for the European Banking Federation would involve incorporating language to identify the assignee. Another concern for debtor banks was the potential conflict of priority among deposit accounts, which under the law of some countries was governed by the location of the debtor, not the assignor.

26. Mr. DOYLE (Observer for Ireland) said that subparagraph (C) dealt with different concepts which should not be merged. He did not object to the exclusion of inter-bank relationships, but shared the misgivings of the representative of France concerning the exclusion of bank deposits. A conscious decision had already been made, following discussion, that they should not be excluded from the scope of draft article 4, but should be excluded from draft articles 11 and 12. There was no reason to reverse that decision.

27. Mr. WHITELEY (United Kingdom) emphasized that if deposit accounts were retained within the scope of the Convention the priority rules of the Convention would be incompatible with United Kingdom law and that of other jurisdictions. He hoped they could be amended in that respect.

28. Mr. COHEN (United States of America) remarked that, if the Commission adhered to the decision mentioned by the observer for Ireland, it had a duty to ensure that the Convention rules would work properly for the receivable concerned. Many of the banks affected believed that neither the priority rules of draft article 24 nor the location rules worked for bank deposit relationships. If they were included within the scope of the draft Convention, great care would have to be taken to avoid harming their operation, and it would be difficult to decide which Convention rules needed adjustment. It seemed better to exclude bank deposit relationships altogether.

29. Mr. MORÁN BOVIO (Spain) pointed out that when a bank accepted a deposit, in most cases the purpose of the depositor, in the case of a business, was to use it as a guarantee or support for other transactions with the bank. The banking community would not look favourably on a convention which permitted such receivables to be readily assigned, because in that case the banks would find

themselves without a sufficient guarantee for the assets concerned. He was in favour of excluding from the scope of the draft Convention both kinds of rights mentioned in subparagraph (D).

30. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)) said that the Working Group had not formally agreed to exclude either kind. One of the aims of the draft Convention was to facilitate the flow of credit by enhancing the predictability and security of credit provision. Care should be taken to avoid defeating that aim.

31. Mr. STOUFFLET (France) pointed out that the lawfulness of bank deposit relationships was not in question; it was common practice to assign receivables arising from bank deposits, and there was no international-law prohibition against doing so. The only question to be decided was whether such operations should be governed by the draft Convention.

32. Mr. DUCAROIR (Observer for the European Banking Federation (EBF)) emphasized that he was not seeking to remove bank deposit relationships altogether but only to exclude them from the scope of draft articles 11 and 12.

33. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) asked whether, in the Commission's view, the inclusion of bank deposit accounts would require adjustment of some provisions of the draft Convention. Would some difference of treatment be needed in draft article 11, and would the provisions concerning identification of the assignee, money-laundering, set-off and priority have to be adjusted?

34. Mr. SCHNEIDER (Germany) agreed with the representative of France that bank deposits should be included within the scope of the draft Convention. There would be no need to amend the existing text for that purpose, since money-laundering was already covered by the identification requirements of special and contract law. The laws on money-laundering did not in themselves prevent any kind of assignment. Anti-assignment agreements should be dealt with in the context of draft article 11.

35. Mr. MORÁN BOVIO (Spain), said that if deposit accounts were included some aspects of the draft Convention would indeed be affected, specifically the question of the applicable law in the case of an assignor in a non-contracting State. That issue would arise if a client of a credit institution deposited a large sum in a bank and assigned the credit to the bank to recover. In such a case, the normal relationship would be reversed, the assignor being the client rather than the bank. That hypothesis had to be considered because under the law of many countries, the forum was the State where the credit institution was located.

36. Mr. COHEN (United States of America) agreed with the representative of Spain that many issues would have to be considered if the bank deposit relationships were covered. To prevent any harm arising from the Convention, every draft article would have to be re-examined to ascertain whether it would work for bank deposits.

37. The CHAIRMAN said that in deciding whether to include or exclude bank deposits, the Commission also had to ascertain whether the core provisions of the draft Convention needed re-examination. A third option would be to include bank deposits but to exclude them from the operation of the anti-assignment clauses.

38. Mr. DOYLE (Observer for Ireland) was convinced that the previous decision of the Working Group had been wrong: bank deposits should have been excluded.

39. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) said that the Working Group had reached its decision because there was a general desire to produce a convention with a very broad scope, but it was now apparent that the decision would generate too many problems. One of the aims of the draft Convention was to make credit available at lower cost. Bank deposit transactions were now proceeding smoothly enough, and from a business point of view there was no advantage in incorporating them within the scope of the draft Convention. Nor were bank clients, in general, seeking to assign their accounts.

40. The CHAIRMAN said he concluded that the Commission had reached a consensus to exclude bank deposits from the scope of the draft Convention. Rights to payment under inter-bank payment systems would be considered in conjunction with subparagraphs (C) and (I). The Commission should therefore turn to the proposed exclusion, in subparagraph (E), of rights to payment from an insurer under an insurance contract, or from a reinsurer under a reinsurance contract.

41. Mr. COHEN (United States of America) explained that the proposal to exclude those rights derived from the fact that the securities, banking and insurance industries and their respective services were tending to merge and therefore required similar treatment. The insurance industry was highly regulated and created settled expectations, which would be disrupted if the Convention were applied to it.

42. Mr. SCHNEIDER (Germany) disagreed. He had never encountered problems in banking supervision law which would be exacerbated by the Convention rules. He felt the draft Convention should not be unduly watered down by repeated exclusions, nor should rules be devised which would be detrimental to those wishing to assign rights stemming from insurance contracts. In Europe, cross-border transactions were frequent, and extra cost and inconvenience would arise if domestic law continued to apply to assignment as in the past.

43. Mr. STOUFFLET (France) took the same view. Credits arising from insurance contracts were common, and losses would be incurred if they could not be assigned to banks. The Commission should have more confidence in the draft Convention.

44. Mr. MORÁN BOVIO (Spain) agreed that exclusion would pose difficulties. It was not clear, however, from the wording of the subparagraph who the assignor would be in such cases: would it be the insurance company holding credit rights vis-à-vis its clients? In that case, exclusion would be problematic.

45. Mr. DESCHAMPS (Observer for Canada) asked whether the term "insurance contract" was intended to cover annuity contracts, which in Canada were often equated with insurance contracts and performed functions akin to bank deposits. He felt that existing practices which worked well should not be interfered with. Lenders and debtors should not be subjected to Convention rules against their will; the Commission should decide on rules to govern their practices only if one side wanted them. In the case of insurance, however, it was not clear that the draft Convention would disturb an existing practice which was working well from the lender's viewpoint. He did not entirely favour exclusion but would prefer a more limited type of exclusion, of the type envisaged in draft article 9.

46. Mr. WHITELEY (United Kingdom) said it was important for the Commission to look at the risks covered by insurance policies. If an insured person who was covered against risk of loss assigned the asset causing the loss, it might be appropriate for both the policy and the loss to be assigned, since the benefit of the policy would accrue to the person suffering the loss. However, it would be inappropriate for one party to be able to purchase protection against risk of loss and then assign it to a third party who did not hold the asset and did not suffer the loss. That would also be an odd situation from the viewpoint of the financial markets. As for insurance policies covering events consequent upon a death, there was a public policy restriction in his country against trading life insurance policies.

47. Mr. SALINGER (Observer for Factors Chain International (FCI)) said that factors and invoice discounters could be affected by the exclusion proposed in subparagraph (E). Some surprising new forms of contract were now being factored: one recent development was factoring services for clinics in holiday resorts to finance claims assigned to them by patients against insurance companies overseas. In most European and Far Eastern countries, the benefits of insurance policies could now be assigned to the factor by virtue of a practice whereby factoring was provided with recourse, on the back of a credit insurance policy issued to the client. It would be useful for the factors providing such services to be accorded international recognition.

48. Mr. BURMAN (United States of America) said that at least five different types of insurance had been discussed, namely, casualty insurance, liability insurance, life insurance, annuities and credit insurance. Perhaps the only thing they had in common was the word "insurance". Different public policies governed different types of insurance. There were different considerations as to whether the rules under the draft Convention applied to an assignment. His delegation feared that if rights to payment from an insurer were not excluded, it would be necessary to test the Convention rules for each type of insurance. The purpose of the tests would be to ensure that the draft Convention did not harm any industries which had the word insurance in their names.

49. The Commission's time was limited. In order not to interfere with well-settled markets, the most prudent course was to refrain from having the draft Convention govern assignments with respect to insurance policies.

50. Mr. SCHNEIDER (Germany) said that it was important to preserve the possibility of making cross-border assignments of receivables stemming from

insurance contracts. He questioned the need to distinguish among different types of insurance. Such distinctions were not made with regard to sales contracts.

51. The CHAIRMAN said that the United States delegation had explained that its proposal was necessary partly for reasons of consistency and partly to cater for an ever-growing field which was already well regulated. However, he did not see much support for the proposal.

The meeting was suspended at 4.40 p.m. and resumed at 5.10 p.m.

52. Mr. BURMAN (United States of America), replying to the representative of Germany, said that there was a difference between insurance and reinsurance. In its contacts with insurance and reinsurance companies, his delegation had heard consistent expressions of significant concern from companies in several lines of insurance and reinsurance.

53. The insurance industry was heavily regulated in most countries. There were specific standards and rules by which its accounts were assessed. Assignments played a role in that assessment. In the reinsurance industry, there was a network of protocols governing the interrelationship between reinsurance participants and the insurance companies that dealt directly with the policies and services which they provided. In neither case had the industry sought coverage under the draft Convention, nor would such coverage be welcomed by either industry. If the current viewpoint was maintained, the Commission would have created for itself a problem that it would regret.

54. His delegation was not talking about excluding a certain kind of assignment. There was a limited but definite market in the assignment of some types of claims under certain kinds of insurance. He questioned, however, whether it was appropriate to seek to have that market covered by draft Convention rules, which in large measure were designed for trade receivables. His delegation recommended that the Commission should not take that risk, as the amount of business which it would cover would not be commensurate with the degree of risk that it would incur if the industry engaged in organized opposition to the final text.

55. The CHAIRMAN said that the United States proposal reflected a concern expressed by its insurance industry, whereas other delegations had expressed opposite concerns. The matter must be resolved.

56. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) said it was important for factors that claims against insurance companies should be included in the Convention. The observer for FCI had explained why that was so. The representative of the United Kingdom had pointed out that assets might be assigned to a third party. The insurance covering those assets was also assigned to a third party. That was exactly what happened in factoring transactions. The factor not only acquired the receivable against the debtor; the factor also took title in the goods to be delivered and was assigned the proper insurance covering those goods for loss or damage in transport. In order to have those transactions ruled by a single law, it would be appropriate to have claims against insurance companies included in the draft

Convention. Otherwise, the factor would need to establish the assignment of the receivable according to the law of the Convention and to look into the law governing assignment of the insurance. Accordingly, if the Commission wished to avoid harming any existing business practices, it should also examine the business practices of the factoring industry, not only those of the insurance companies.

57. Mr. BURMAN (United States of America) said that the application of the Convention would be helpful to the factoring industry in respect of certain types of insurance. He wondered whether it would be helpful to the Commission to recognize the distinction between life insurance and annuity insurance and all other types of insurance. Perhaps the exclusion should be limited to those types of insurance policies that were actually investment vehicles.

58. The CHAIRMAN said that possibility had been mooted earlier; however, he did not recall any comments having been made on it.

59. Mr. RENGER (Germany) urged the Commission to begin discussing which claims out of which contracts should be included or excluded. Nothing provided for in the draft Convention would interfere with the regulations applying to insurance companies. What was at issue was payment from an insurer. Thus, the claimant was never an insurance company; it was always another person. He therefore failed to understand why a problem was perceived. If payments from an insurer were excluded, it would be unclear to whom the draft Convention applied. The Commission would be creating loopholes while at the same time believing that it was establishing a uniform law for the international assignment of receivables. While he saw no need for the distinction proposed by the United States delegation, his delegation could accept the exclusion of reinsurance companies.

60. Mr. WHITELEY (United Kingdom), referring to the statements made by the factoring industry representatives, said that, with regard to assignments of rights under insurance contracts, the examples given had focused on situations where the loss had already occurred. What was being assigned was a crystallized right to payment. The reason for the assignment was to short-circuit the settlement procedure. He requested clarification of whether that was the real focus of the industry's concern, or whether it was also interested in ensuring that potential claims under insurance contracts could be assigned even where the condition for payment had not yet occurred.

61. Mr. SALINGER (Observer for Factors Chain International (FCI)), replying to the United Kingdom representative, said that the second hypothesis was correct. A supplier of goods and services entered into a factoring agreement for the factoring of all the debt that arose from the whole of his business for a minimum of one year. As one of the conditions of the factoring agreement, he must have issued to him a policy of credit insurance, all the benefits and rights of which were to be assigned to the factor. There might never be a claim under that insurance policy. If there was a bad debt, however, the insurance company would pay the factor directly. Having already paid a substantial part of the debt to the client, and having been paid by the insurance company, the factor would not need to recost the debt.

62. Mr. DOYLE (Observer for Ireland), supporting the statement made by the representative of Germany, said that there was a danger in making too many exceptions. It was clear that there was a good reason for excluding banking deposits, namely, that it would be difficult, if not impossible, to apply the Convention to them. That did not appear to be the ground for the exclusion of insurance contracts, mainly because the industry did not wish to have them included.

63. The CHAIRMAN said that the United States proposal to exclude rights to payment under insurance and reinsurance contracts had failed to elicit a consensus. The Commission would have an opportunity to revisit all the provisions once a working draft had been prepared. In the meantime, it should turn to subparagraph (ii) (F).

64. Mr. COHEN (United States of America) explained that the exclusion proposed by his delegation in subparagraph (ii) (F) concerned rights to payment for goods sold or leased to the extent that under the law of the State where the goods were located the goods were considered to be part of the real estate on which the goods were situated. The rules governing interests in real estate and payments flowing from real estate, such as rents and lease payments, were very local in nature and often highly prized by local jurisdictions. If the draft Convention applied to such receivables, conflicts could arise between the right to the receivable and the right to the real estate. The possible complications were not justified by the commercial utility of including such receivables.

65. Mr. FERRARI (Italy) said that his delegation saw no reason for the exclusion.

66. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) suggested that the intent of the exclusion might be served simply by referring to rights to payment arising from the sale or lease of real estate. If, under local law, certain goods became part of real estate, they would also be covered by the formulation.

67. Mr. COHEN (United States of America) said that he found the suggestion helpful and proposed that the Commission should consider it.

68. Mr. FERRARI (Italy) said that his delegation liked the wording just suggested. Under the United States formulation, a prefabricated-garage manufacturer, for example, who wished to make an assignment of receivables would not be covered by the draft Convention.

69. Mr. Al-NASSER (Observer for Saudi Arabia) said that his delegation felt that the exclusion was not needed. It might be appropriate in a model law, but not in a convention. In the interests of promoting international trade, it would be better to omit it.

70. Mr. DOYLE (Observer for Ireland) said that his delegation had supported the United States proposal but was even happier with the language suggested by the Secretary of the Working Group. The strongest concern that had been expressed by industry groups in Ireland had been that the definition of receivables was so wide that it did not clearly exclude interests arising from real property. With

the present exclusion, the draft Convention should meet with a better reception in Ireland.

71. Mr. MORÁN BOVIO (Spain) said that he had not discussed the matter with industry groups in Spain, but he was aware that many real-estate companies depended for their financing on the assignment of their receivables from the sale of lots or lease of premises. Although he saw no strong reason in support of the exclusion, if it found favour with those who foresaw problems with local real estate law, he would prefer the Secretariat reformulation.

72. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) said that, although his group naturally had no strong opinions on the advisability of excluding receivables arising from the sale or lease of real estate, it was very concerned that the exclusion should not be worded so broadly that it would exclude from the draft Convention the factoring of goods that would in the future become fixtures of a building, in other words, the whole range of construction materials. The ultimate legal fate of the materials should not affect the factoring agreement.

73. Mr. WHITELEY (United Kingdom) said that his delegation supported the amended wording. Its position was that if the Commission decided against an exclusion of real property interests, the priority rules would have to be changed. Priority with regard to real estate in the United Kingdom was determined by a system of registration, and, should the assignor of the interest be in a different State, the United Kingdom would wish the registration system to prevail.

74. Ms. WALSH (Observer for Canada) said that her delegation agreed that, for the reasons given by Italy and EUROPAFACTORING, the United States wording was unnecessarily broad and would exclude true trade receivables. She would appreciate clarification on the relationship between the new wording proposed by the Secretariat and article 12 of the draft Convention, which dealt in part with mortgages. She wondered whether there was a rationale for excluding receivables from the sale or lease of land but not mortgage interest. If, as the statement by the United Kingdom suggested, the main concern was the applicable rule in article 24 of the Convention, complete exclusion would be an inappropriate narrowing of the draft Convention. Perhaps the problem could be solved through a refinement of article 12 or article 24, and a small informal group could work on the problem.

75. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that if the issue was solely that of the law governing priority applicable to receivables arising from the sale and lease of real estate, then there were two possible solutions, as the United Kingdom and Canada had pointed out. Such receivables could be excluded or a different priority rule could be devised for them in article 24 and subsequent relevant articles. In the case of an exclusion, article 12 would no longer apply to security interests in real estate and would have to be amended.

The meeting rose at 6 p.m.